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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 209

THE RUSH STREET RUGBY SHOP, LTD. AND
MISS RUGBY SHOP, LTD.,
Plaintiffs-Respondents,

AND

ONE EAST MANUFACTURING CO., LTD.,
Plaintiff,

vs.

MARYLAND CASUALTY COMPANY,
Defendant-Petitioner.

PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit in the cause therein numbered 17227 was written by Circuit Judge Swygert and concurred in by Circuit Judge Kiley and District Judge Holder who sat by designation from the Southern District of Indiana. The opinion, which is appended hereto in appendix A *post*, had not been officially reported at the time of the printing of this petition.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The judgment of the United States Court of Appeals in this cause was entered on the 11th day of April, 1969.

(ii) A timely petition for rehearing with the suggestion that the matter be heard by the Court in banc was denied on the 5th day of May, 1969.

(iii) The jurisdiction of this Court is invoked under United States Code, Title 28, Sec. 1254, which provides for the review of decisions of the United States Court of Appeals by a writ of certiorari granted upon petition.

QUESTIONS PRESENTED.

The District Court for the Northern District of Illinois, Eastern Division, dismissed the claim of respondent corporations in this diversity case which is concededly governed by Illinois law, under the Illinois rule (established by an intermediate Appellate Court and approved by the state's highest Court), that corporations which have disregarded their statutory obligation to pay state franchise taxes are prohibited from commencing suit so as to toll the running

of the applicable period of limitations. The Court of Appeals' reversal of the decision, notwithstanding the Illinois rule, presents the following questions for review:

A. Whether the Court of Appeals' "differentiation" of established Illinois law is really a refusal to apply that law in deference to the Court's personal predilection in disregard of the ruling in *West* v. *American Telephone & Telegraph Co.* (1940), 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 145, wherein this Court held that a federal Court "is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation."

B. Whether the Court of Appeals' refusal to recognize the applicable contractual limitations provision, contrary to Illinois law, on the apparent basis that petitioner (defendant below) is an insurance company, has unjustly discriminated against and deprived petitioner of its property in contravention of the constitutional safeguards of the Fifth Amendment to the United States Constitution.

C. Whether the Court of Appeals' disregard of the rule in *Woods* v. *Interstate Realty Co.* (1948), 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524, 1527, wherein this Court held: ". . . where . . . one is barred from recovery in the state court, he should likewise be barred in the federal court", can be justified by considering the issue of the respondent corporations' capacity to sue as a question of "access to the courts" rather than one of substance, under circumstances where Illinois is also the situs of respondents' incorporation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

CONSTITUTIONAL PROVISIONS:

The Fifth Amendment to the Constitution of the United States, the pertinent part of which reads:

> "... nor shall any person ... be deprived of ... property, without due process of law; ...".

The Tenth Amendment to the Constitution of the United States, which reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS DIRECTLY INVOLVED:

Ch. 32, Sec. 157.131 (Ill. Rev. Stats.) which provides in pertinent part:

> "For the privilege of exercising its franchises in this state, each domestic corporation shall pay to the Secretary of State ... franchise taxes ...".

Ch. 32, Sec. 157.142 (Ill. Rev. Stats.) which reads:

> **"Effect of non-payment of fees and franchise taxes.**
>
> "No corporation required to pay a franchise tax, license fee or penalty under this Act shall maintain any action at law or suit in equity until all such franchise taxes, license fees and penalties have been paid in full."

STATUTORY PROVISIONS INDIRECTLY INVOLVED:

Ch. 32, Sec. 157.94 (Ill. Rev. Stats.) which reads in pertinent part:

> **"Survival of remedy after dissolution.**
>
> "The dissolution of a corporation ... shall not take away or impair any remedy available to or against such corporation ... for any right or claim existing,

or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution . . .".

Ch. 110, Sec. 48(1)(e) (Ill. Rev. Stats.) which provides in pertinent part:

> **"Involuntary Dismissal Based Upon Certain Defects or Defenses.**
>
> (1) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:
>
> * * * * *
>
> (e) That the action was not commenced within the time limited by law."

Ch. 83, Sec. 24(a) (Ill. Rev. Stats.) which provides in pertinent part:

> **"Commencement of a new action upon reversal or non-suit.**
>
> 24. In the actions *specified in this act or any other act or contract* where the time for commencing an action is limited, if . . . (upon reversal or non-suit under certain conditions) . . . then, whether or not the time limitation for bringing such action expires during the pendency of such suit, the plaintiff, his heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or given against the plaintiff, or after the plaintiff is non-suited or the action is dismissed for want of prosecution." (Emphasis supplied.)

United States Code, Title 28, Sec. 17(b) (Rule 17(b) of the Federal Rules of Civil Procedure) which provides in pertinent part:

> ". . . the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized . . .".

STATEMENT OF THE CASE.

This is an action by respondents to recover for damage to their property under a policy of fire insurance issued by petitioner. The fire insurance policy suit limitations provision, as extended by agreement of the parties, here required commencement of this action on or before April 10, 1967, and provides that violation of this prescript bars the action (App. 4, 14).

Plaintiffs are Illinois corporations bound by the provisions of the Illinois Corporation Act and thereby required to pay an annual franchise tax for the privileges of their corporate existence:

> "For the privilege of exercising its franchises in this state, each domestic corporation shall pay to the Secretary of State . . . franchise taxes . . .". Ch. 32, Sec. 157.131 (Ill. Rev. Stats.).

Respondents concede that they disregarded their statutory obligation to pay franchise taxes in July, 1966 and remained in default of said obligation until at least April 28, 1967. Thus respondents were in bad standing in Illinois on April 10, 1967, the date the suit papers were filed (App. 1). The effect of such default upon the corporate privilege of bringing suit has been explicitly stated by the Legislature in a declaration which has been held to state the public policy of Illinois (*Elsberry Equipment Co.* v. *Short* [1965], 63 Ill. App. 2d 336, 211 N. E. 2d 463):

> **"Effect of non-payment of fees and franchise taxes.** "No corporation required to pay a franchise tax . . . under this Act shall maintain any action at law or suit in equity until all such franchise taxes . . . have been paid in full." Ch. 32, Sec. 157.142 (Ill. Rev. Stats.).

Jorgensen v. *Baker* (1959), 21 Ill. App. 2d 196, 157 N. E. 2d 773 (review of which was declined both by the Illinois

Supreme Court (17 Ill. 2d 629) and the United States Supreme Court (361 U. S. 962, 4 L. Ed. 2d 543) considered the statute under the circumstances of the instant case where the applicable limitations provision had expired during the period of the plaintiff corporations' statutory disability. That decision which subsequently was held to enunciate basic Illinois public policy and which has not been contradicted by any Illinois decision, held that an Illinois corporation which was in default of payment of franchise taxes was barred from either maintaining or commencing suit, and that the filing of suit without the right, under the law, to do so was not a valid commencement of the action and did not stop the running of the applicable period of limitations. Thus it is petitioner's position that respondents did not validly "commence" suit within the applicable period of limitations. Petitioner's position is not, as erroneously stated by the Court below (Appendix p. 2-a), limited to respondents' right to maintain the action.

The jurisdiction of the federal Courts here rests exclusively upon diversity of citizenship and Illinois law controls. Thus, the District Court for the Northern District of Illinois, Eastern Division, per Judge J. Sam Perry, granted summary judgment for petitioner and against respondents, holding that by reason of the disability imposed by the Illinois Legislature, the mere filing of suit papers was not a valid commencement of this action under Illinois law and did not toll the limitations period and thus suit was barred.

Although, in reversing, the Court of Appeals initially professed to distinguish the Illinois rule, it thereafter intimated that it was of the conviction that the ". . . Illinois Supreme Court (if) faced with the situation . . . would . . . not follow the *Jorgensen* decision". Nevertheless, the Court did not refer to or rely upon any datum to support its conclusion as to the "position" of the Illinois Supreme

Court. It merely relied upon an unpublished ruling by the United States District Court for the Northern District of Illinois in Case No. 67 C 211, which Court also refused to follow *Jorgensen*.

BASIS FOR FEDERAL JURISDICTION.

The basis for federal jurisdiction in the District Court was diversity of citizenship and the requisite jurisdictional amount.

ARGUMENT.

RESPONDENTS' CLAIM IS HERE BARRED BY THEIR FAILURE, UNDER ILLINOIS LAW, TO EFFECTIVELY COMMENCE THIS ACTION WITHIN THE APPLICABLE PERIOD OF LIMITATIONS. THE COURT OF APPEALS' REFUSAL TO BE BOUND BY ILLINOIS LAW IS VIOLATIVE OF THAT PRINCIPLE FOUNDED IN CONSTITUTIONAL SAFEGUARDS THAT, FOR PURPOSES OF DIVERSITY JURISDICTION, A FEDERAL COURT IS IN EFFECT ONLY ANOTHER COURT OF THE STATE.

A.

The Court of Appeals' "Distinction" of the Illinois Rule Is Illusory; That Court Simply Substituted Its Own Opinion for Illinois Law Which Here Required Dismissal of Respondents' Action.

Petitioner is an insurance company and although several defenses in its answer go to the merits, its position before the Court of Appeals was based upon the Illinois statute declaring the public policy of that state which precludes these two tax delinquent respondents from access to any Courts *without regard to the merits of their claim.* It appears that the Court was so overwhelmed by the so-called equities for the respondents that it was dissuaded from accepting and applying Illinois law.

The applicable Illinois law is not open to construction. Respondents' physical placement of suit papers with the clerk of the Court on the last day allowed for commencement of suit was an ineffective attempt to stop the running of the applicable period of limitations; respondents were under legislative disability and incapable of commencing suit. Illinois has consistently ruled that under Ch. 32,

Sec. 157.142 (Ill. Rev. Stat.), which sets forth the disability imposed on tax delinquent Illinois corporations, such corporations have "no right to invoke an action of any kind under the laws of this state." *J. Walter Thompson Co.* v. *Whitehed* (1900), 185 Ill. 454, 464, 465, 56 N. E. 1106; *Shore Management Corp.* v. *Erickson* (1942, Abst.), 314 Ill. App. 571, 41 N. E. 2d 972.

Even more conclusive is Illinois' application of this rule under circumstances virtually identical to those here presented. In *Jorgensen* v. *Baker* (1959), 21 Ill. App. 2d 196, 157 N. E. 2d 773, pet. lv. app. den. 17 Ill. 2d 629, cert. den. 361 U. S. 962, 4 L. Ed. 2d 543, the Court held that an Illinois corporation which was in default in the payment of franchise taxes was barred from maintaining or commencing suit, and the filing of suit without right under the law to do so did not stop the running of the applicable period of limitations. Although in Illinois a delinquent corporation which had timely filed or commenced suit might continue the prosecution of the action by subsequent compliance with its obligation to pay the franchise tax,[1] the *Jorgensen* Court held that such rule "does not apply when the statute of limitations has run before a delinquent corporation re-acquires the right to use the Courts of (the) state. To hold otherwise would be to ignore the effect and purpose of the statute."

Jorgensen Cannot Be Distinguished.

The Court of Appeals' "distinction" of *Jorgensen* is no more than a contrived device designed to contravene the rule. None of the "significant" differences referred to by the Court is valid.

First, the dissolution of the plaintiff corporation in

1. *Sternberg Dredging Co.* v. *Estate of Sternberg* (1953, Abst.), 351 Ill. App. 514, 115 N. E. 2d 557; *Sheffield Steel & Iron Co.* v. *Joseph & Bros. Co.* (1925), 238 Ill. App. 45.

Jorgensen was not a basis in any degree for the Court's decision. The *Jorgensen* Court was concerned only with the corporation's capacity to sue as that capacity existed on August 4, 1952, the date suit was filed. The corporation was then in default in the payment of its franchise taxes and the Court held that the corporation had no right to commence suit *on that date* (21 Ill. App. 2d 196, 202). The dissolution did not occur until 1954—*over two years later.* Dissolution was a question with which the Court did not concern itself at all and which was entirely irrelevant to the question of the bar of the limitations period.

Moreover, the Illinois Legislature has specifically preserved the right of a corporation to sue for two years after dissolution (Ch. 32, Sec. 157.194, Ill. Rev. Stats.). Thus dissolution alone (without failure to pay franchise taxes) could not have prevented the plaintiff from commencing suit so as to toll the running of the limitations period and could not conceivably have prevented a basis for the Court's decision.

Second, whether the limitation is prescribed in the insurance policy or by a section of the limitations act is immaterial. The efficacy of each is identical. Each requires that suit be "commenced" within a prescribed period of time and they are given equal effect by the Illinois Limitations Act. Sec. 24(a) of that act which provides for the refiling of suit after the expiration of the period of limitations under circumstances not here present, specifically applies to all kinds of limitations provisions whether provided by ". . . this act or any other act or contract . . ." (Ill. Rev. Stats., Ch. 83, Sec. 24(a)).

Additionally, Illinois has consistently held, and respondents do not dispute, that the policy limitation provision is a valid and binding bar to a tardy claim. *Midwest Triangle Paint Works* v. *Firemens Ins. Co.* (1962), 36 Ill. App. 2d 65, 183 N. E. 2d 562; *Advance Methods, Inc.* v.

Grain Dealers Mutual Ins. Co. (7th Cir. 1960), 274 F. 2d 634; *Heffron* v. *Rochester German Ins. Co.* (1905), 119 Ill. App. 566, aff'd. 220 Ill. 514. Indeed Illinois considers the fire policy limitations provision, not as a contractual provision subject to a rule of liberal construction, but as a compulsory form limitation prescribed pursuant to statutory directive. *Midwest Triangle Paint Works* v. *Firemens Ins. Co., supra.*

Third, the Court's attempt to distinguish between the terms "commencement" and "maintenance" is without merit. As stated above, the *Jorgensen* Court specifically held that plaintiff had no right to *commence* the suit when the complaint was filed in 1952. Indeed, the defense in *Jorgensen* was raised under Sec. 48(1)(e) of the Illinois Civil Practice Act, which provides:

> "That the action was *not commenced* within the time limited by law." (Emphasis supplied.) (Ch. 110, Sec. 48(1)(e), Ill. Rev. Stats.)

The statute under which the motion was made in *Jorgensen* as well as the ruling of the Court both relate to the word "commence" which is the same word used in the fire insurance policy suit limitations provision. Thus, under Illinois law, there is no basis whatsoever for distinguishing between a statutory and a fire insurance policy suit limitations provision.

The Court of Appeals' opinion reveals on its face that the Court recognized that *Jorgensen* cannot be distinguished. Page 4a thereof demonstrates that the Court merely substituted its belief as to what the law should be for the opinion of the Illinois Courts: "We *believe* a distinction should be drawn between the commencement of suit within the insurance policy's limitations period and the maintenance of it in the Illinois Courts before the payment of delinquent franchise taxes. If the Illinois Supreme Court

were faced with the situation before us, we *are of the view* that it would draw an identical distinction and not follow the *Jorgensen* decision". (Emphasis supplied.) Nevertheless, the Court was unable to support its "belief" with the datum required to reject the state Court decision.

The Jorgensen Decision Is the Illinois Law.

Had the *Jorgensen* opinion merely represented the view of an intermediate appellate tribunal it would still have been a conclusive bar to respondents' claim. The doctrine of *Erie R. Co.* v. *Tompkins* (1937), 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, which, to promote uniformity in the administration of state law and to prevent grave discrimination against those not entitled to invoke the jurisdiction of the federal Courts, gave effect to the Tenth Amendment's reservation to the states of those powers not conferred upon the federal Courts, here requires a realistic appraisal of state law. The doctrine cannot be restricted to those relatively few instances where the state's highest tribunal has passed upon the particular issue. State law exists irrespective of whether it has been voiced by such tribunal. The appropriate rule was succinctly stated by this Court in *West* v. *American Telephone & Telegraph Co.* (1940), 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 144:

> ". . . the obvious purpose of § 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.
>
> "A state is not without law save as its highest Court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and

inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts. See *Erie R. Co.* v. *Tompkins*, *supra* (304 U. S. 78, 82 L. Ed. 1194, 58 S. Ct. 817, 114 A. L. R. 1487); *Russell* v. *Todd*, *supra* (309 U. S. 293, 84 L. Ed. 762, 60 S. Ct. 527).

"Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *Six Cos. of Cal.* v. *Joint Highway Dist. No. 267*, decided this day (311 U. S. 180, *ante*, 114, 61 S. Ct. 186); *Fidelity Union Trust Co.* v. *Field*, No. 32, decided this day (311 U. S. 169, *ante*, 109, 61 S. Ct. 176); Cf. *Graham* v. *White-Phillips Co.*, 296 U. S. 27, 80 L. Ed. 20, 56 S. Ct. 21, 102 A. L. R. 24; *Wichita Royalty Co.* v. *City National Bank*, *supra* (306 U. S. 107, 83 L. Ed. 517, 59 S. Ct. 420); *Russell* v. *Todd*, 309 U. S. 280, 84 L. Ed. 754, 60 S. Ct. 527, *supra*."

The opinion of the Court of Appeals demonstrates, on its face, that the Court had no such "other persuasive data" to justify its rejection of *Jorgensen*. The Court merely voiced its personal preference without making any reference to the *West* decision.

The Court's error is compounded because the Supreme

Court of Illinois has approved the Jorgensen decision. The petition for leave to appeal which advanced the same theories presented below by respondents[2] was presented to and rejected by the Illinois Supreme Court (17 Ill. 2d 629); the effect of such rejection was established in no uncertain terms in *Walters* v. *Walters* (1951), 409 Ill. 298, 305, 99 N. E. 2d 342, wherein the Court stated:

> "The denial of leave to appeal, then, attests that this Court thought the result was correct and proper under the facts there presented."

This Court has also recognized that the denial of a petition for leave to appeal by a state high Court is not to be lightly regarded. In *West* v. *American Telephone & Telegraph, Co., supra,* this Court reversed the Court of Appeals' refusal to follow the decision of an intermediate appellate Court of Ohio, under circumstances where the high Court of that state had rejected a motion to review the appellate Court's decision. After having stated that the ruling of an intermediate tribunal "is not to be disregarded" in the absence of persuasive data to the contrary, this Court then held that this rule is even more compelling where the state's highest Court has refused review, 85 L. Ed. 144:

> ". . . This is more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. True, some other court of appeals of Ohio may, in some other case, arrive at a different conclusion and the Supreme Court of Ohio, notwithstanding its refusal to review the state decision against the petitioner may hold itself free to modify or reject the ruling thus announced. . . . Even though

2. Certified copies of the petition and the answer thereto were filed with the Court of Appeals and are part of the record which has been transferred to this Court.

it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the *West* case, whether that will ever happen remains a matter of conjecture. In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had. If the present suit had been brought in the Cuyahoga county court no reason is advanced for supposing that the Cuyahoga court of appeals would depart from its previous ruling or that the Supreme Court of the state would grant the relief which it withheld before. We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that *the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation.*"

B.

The Refusal to Accept the Binding Principle of Jorgensen Is an Unconstitutional Abrogation of the Requirement that in Diversity Cases State Law Regarding Access to the Courts Controls.

The rule that, for purposes of diversity jurisdiction, a federal Court is to be considered simply another Court of the state here bound the Court of Appeals to apply the *Jorgensen* rule. The banning of delinquent corporations from Illinois Courts is a matter of "substance". Illinois has struck at the capacity of those corporations to sue. The corporate respondents have gained their very existence and possess their various franchises, including the privilege of bringing suit, *solely* by leave of Illinois which is the state of their incorporation. That it is the right of that state to revoke such privilege and that respondents may not elude this penalty by filing suit in the federal Court is ex-

pressly recognized by Rule 17(b) of the Federal Rules of Civil Procedure, which provides that "the capacity of a corporation to sue . . . shall be determined by the law under which it was organized." Thus, irrespective of what law may apply in a case where the state in which the Court sits is not the state in which the plaintiffs were incorporated, respondents here are bound by Illinois law under the rule of *Woods* v. *Interstate Realty Co.* (1948), 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524:

> "... where ... one is barred from recovery in the state court, he should likewise be barred in the federal court."

In distinguishing "between the commencement of a suit *within the insurance policy's limitations period* . . ." and the commencement of suit within the statutory limitations period considered in *Jorgensen,* the Court of Appeals revealed that the gist of its "distinction" of *Jorgensen* is that while the rule of that case is valid as to other litigants it cannot form a basis for an insurance company's defense.

This ruling constitutes *both* an unreasonable and unlawful discrimination *and* an abrogation of the right of property in violation of the guarantees of due process under the Fifth Amendment to the United States Constitution.[3] The insurer here was unconstitutionally discriminated against under a dichotomy not recognized by state law by a deprivation of a defense to which it would have been entitled had the litigation not been instituted in the federal Court. Additionally, the unfairness of refusing to treat all litigants equally because of the fortuitous circumstance of diversity is compounded by the destruction of petitioner's contrac-

3. While the Fifth Amendment to the United States Constitution does not contain an explicit safeguard of an equal protection clause such protection is generally derived from the "due process" clause of that amendment. *Bolling* v. *Sharpe,* 1954, 347 U. S. 497, 98 L. Ed. 884, 74 S. Ct. 693.

tual rights without due process of law. The law of Illinois (the situs of the execution of the contract) here must determine whether the contractual limitations provision effectively bars respondents' claim. *Guaranty Trust Co.* v. *York* (1945), 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079. This Court has expressly ruled that the refusal to accept an insurance policy suit limitations provision as valid and effective where such provision is valid under the law of the state where the contract was executed (here Illinois, App. 1, 2) is an unconstitutional deprivation of property without due process of law. *Home Insurance Co.* v. *Dick* (1929), 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926; *Hartford Accident & Indemnity Co.* v. *Delta and Pine Land Co.* (1933), 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178.

If the present decision is allowed to stand, all insurance companies standing in the position of defendants will be deprived of the right to rely upon the Illinois statute and the decisions thereunder, declaring as the public policy of Illinois that tax delinquent corporations are disfranchised of their privilege of commencing suit and thereby tolling the applicable period of limitations, while all other defendants can rely thereon. This creates the very dichotomy and unconstitutional discrimination condemned by this Court in *Woods* v. *Interstate Realty Co., supra,* wherein this Court stated at 93 L. Ed. 2d 1527:

> "... a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in diversity cases ... where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the state in favor of those authorized to invoke the diversity jurisdiction of the federal court."

CONCLUSION.

The Court of Appeals' rejection of Illinois law is based *solely* upon its "belief", premised in speculation, that Illinois law should or will be to the contrary at some future date. By "distinguishing" *Jorgensen,* the Court has singled out and discriminated against insurers, as opposed to all other classes of litigants, and thereby unconstitutionally deprived petitioner of a defense which it would have been afforded in the state Courts.

WHEREFORE, for the reasons above stated and upon the authorities cited, petitioner respectfully prays that this Honorable Court grant its writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and that, upon review, the decision below be reversed with directions that the judgment entered in the district Court for petitioner be affirmed.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

SEPTEMBER TERM, 1968 — JANUARY SESSION, 1969

No. 17227
THE RUSH STREET RUGBY SHOP, LTD., and MISS RUGBY SHOP, LTD., *Plaintiffs-Appellants*,
and ONE EAST MANUFACTURING CO., LTD., *Plaintiff*,
vs.
MARYLAND CASUALTY COMPANY, *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

APRIL 11, 1969.

Before KILEY, SWYGERT, *Circuit Judges*, and HOLDER, *District Judge*.[1]

SWYGERT, *Circuit Judge*. This is a diversity action brought by The Rush Street Rugby Shop, Ltd., Miss Rugby Shop, Ltd., and One East Manufacturing Co., Ltd. against the Maryland Casualty Company to recover for loss and damage to the contents of the plaintiffs' business establishments under the defendant's fire insurance policy which covered the plaintiffs' loss for such an event. The com-

1. Judge Holder is sitting by designation from the Southern District of Indiana.

plaint was filed by all three plaintiffs who appeared jointly as insureds under the policy, but the complaint alleges loss and damage only to two plaintiffs, The Rush Street Rugby Shop, Ltd. and Miss Rugby Shop, Ltd. In its answer, Maryland Casualty Company asserted that the plaintiffs were barred from pursuing the action because of their delinquency in paying the franchise taxes assessed against them by the State of Illinois. Thereafter, the defendant moved for summary judgment, predicating its motion upon the plaintiffs' tax delinquency and asserting further that because of the policy suit limitation provision the restoration of the plaintiffs to good standing by their payment of the delinquent franchise taxes came too late to permit the maintenance of the action. The district court granted the defendant's motion for summary judgment and dismissed the action. The plaintiffs appeal from this judgment.

The insurance policy upon which the plaintiffs' action is based contains a provision requiring that the action against the insuror be commenced within twelve months following inception of the loss. Although the loss occurred February 8, 1966, the defendant expressly extended the time for filing an action from February 8, 1967 to April 10, 1967. On April 10, 1967, when the action was filed in the district court, the plaintiff Illinois corporations had not paid their required annual Illinois franchise taxes. Chapter 32, Section 157.142, Paragraph 2 of the Illinois Revised Statutes 1967, provides:

> No corporation required to pay a franchise tax, license fee or penalty under this Act shall maintain any action at law or suit in equity until all such franchise taxes, license fees and penalties have been paid in full.

As previously mentioned, the defendant's answer asserted as a defense that the plaintiffs could not "maintain" the

action because they were not in good standing by reason of their franchise tax delinquency. Immediately thereafter, the plaintiffs paid the 1966 franchise taxes due the State of Illinois and were restored to good standing as provided for by section 157.142. The sole question is whether by reason of the statutory disability imposed by section 157.142 the plaintiffs were barred from commencing their action even though the complaint was filed within the time limitation period provided by the policy and as extended by the defendant.

The defendant contends that because of the plaintiffs' failure to pay the 1966 Illinois franchise taxes they were barred from filing this action on April 10, 1967. It is asserted that since the insurance policy suit limitation period expired prior to payment of the delinquent taxes and consequent reinstatement of the plaintiffs to good standing, the plaintiffs' claims under the policy must have been permanently extinguished. The defendant, relying primarily on *Jorgensen* v. *Baker*, 21 Ill. App. 2d 196 (1959), argues that the situation presented there is indistinguishable from the instant case. We believe, however, that there are legally significant factual differences in *Jorgensen* which render the *Jorgensen* decision distinguishable from the case at bar. In *Jorgensen* the suit was filed within the applicable five-year statute of limitations. However, at the time the suit was filed, the plaintiff, an Illinois corporation, was in default in payment of its annual franchise tax. Later, the plaintiff paid the tax but after the statute of limitations had run. The Appellate Court of Illinois observed first that the Illinois courts had held that if a delinquent corporation had timely filed or commenced a suit, it might continue the prosecution of the action by subsequent compliance with the franchise tax statute. As authority the court relied on *Sternberg Dredging Co.* v. *Estate of Sternberg*, 351 Ill. App. 514 (1953), and *Sheffield*

Steel & Iron Co. v. *Joseph & Bros. Co.*, 238 Ill. App. 45 (1925). The court pointed out that the five-year statute of limitations had expired prior to the payment of the plaintiffs' franchise taxes. After stating that the plaintiff corporation "may have come within the rule as set out in the . . . [*Sternberg* and *Sheffield* cases]; but it did not, and we believe its efforts . . . in 1957 to get within the rule was futile as well as belated," the court held: "The rule does not apply when the statute of limitation has run before a delinquent corporation reacquires the right to use the courts of our state. To hold otherwise would be to ignore the effect and purpose of the statute."

A significant difference between the *Jorgensen* case and the case at bar is that the plaintiff corporation in *Jorgensen* had been dissolved for nonpayment of state franchise taxes while the suit was in progress and therefore had no corporate powers. The plaintiffs in the instant case were never dissolved and were continuously functioning as active corporations. Another difference is that in *Jorgensen* the period of limitations for the institution of an action was fixed by statute, whereas in the instant suit the limitation was fixed by contract which provided "no suit or action on this policy . . . shall be sustainable in any court of law . . . . unless commenced within twelve months next after the inception of the loss." Since the instant action was commenced by the filing of a complaint within the limitations period granted by the defendant, the only question is whether section 157.142 should apply so as to bar the action even though the plaintiffs later paid the delinquent franchise taxes and were restored to good standing. We believe a distinction should be drawn between the commencement of a suit within the insurance policy's limitations period and the maintenance of it in the Illinois courts before the payment of delinquent franchise taxes. If the Illinois Supreme Court were faced with the situation be-

fore us, we are of the view that it would draw an identical distinction and not follow the *Jorgensen* decision. As Judge Will said in his memorandum opinion in a companion case, *The Rush Street Rugby Shop, Ltd., et al.* v. *The Aetna Casualty and Surety Company, et al.*, No. 67 C 211 (N. D. Ill., filed July 31, 1967): "Whether the franchise tax is paid before or after the one-year period has run can make no difference to defendants . . . because the only issue is whether the suit was legally *commenced* by a particular date, not whether the suit could be *maintained* on or by a particular date."

For the foregoing reasons we are of the opinion that the district court erred in dismissing the suit. The judgment is reversed.

APPENDIX B.

The judgment order entered by the United States Court of Appeals for the 7th Circuit in case No. 17227 on April 11, 1969, review of which is herein sought, as follows:

> "This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.
>
> "On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, with costs, in accordance with the opinion of this Court filed this day."